

STATE OF MICHIGAN  
IN THE SUPREME COURT

LISA TYRA

Plaintiff-Appellee,

Supreme Court No. 148079  
Court of Appeals No: 298444  
Lower Court Case No. 09-103111-NH

v.

ORGAN PROCUREMENT AGENCY OF  
MICHIGAN, a Michigan corporation d/b/a  
GIFT OF LIFE MICHIGAN, STEVEN COHN, M.D.,  
DILLIP SAMARA PUNGAVAN, M.D., WILLIAM  
BEAUMONT HOSPITAL, a Michigan corporation,  
and JOHN DOE, believed to be Transplant Coordinator,

Defendants-Appellants.

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**SUPPLEMENTAL BRIEF SUPPORTING  
APPLICATION FOR LEAVE TO APPEAL  
BY DEFENDANT-APPELLANT GIFT OF LIFE**

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## STATEMENT OF QUESTIONS PRESENTED

1. Whether *Zwiers v Growney*, 286 Mich App 38 (2009) was overruled by *Driver v Naini*, 490 Mich 239 (2011)?

Defendant-Appellant Gift of Life says “Yes”  
Plaintiff-Appellee says “No”  
The trial court did not consider this issue  
The Court of Appeals implicitly said “No”.

2. Whether Defendant’s affirmative defenses were defective because they did not specifically state the grounds for this defense?

Defendant-Appellant Gift of Life says “No”  
Plaintiff-Appellee says “Yes”  
The trial court said “No”.  
The Court of Appeals said “Yes”.

## INTRODUCTION

In the Order setting oral argument on this Application for Leave, this Court directed the parties to be prepared to address two issues at oral argument: (1) whether *Zwiers v Grownney*, 286 Mich App 38 (2009) was overruled by *Driver v Naini*, 490 Mich 239 (2011) and (2) whether Defendant's affirmative defenses were defective because they did not specifically state the grounds for this defense? The application for leave to appeal and supporting brief submitted by Defendant-Appellant Organ Procurement Agency of Michigan d/b/a Gift Of Life Michigan ("Gift of Life") addressed the first issue in depth. Gift of Life submits its supplemental brief to address the second issue.

## ARGUMENT

What constitutes adequate notice depends upon the circumstances. This is not the first medical malpractice action filed after the major, statutory, tort reform of the 1990s. Nor is this the first time that this Court has considered the interaction between sections 2912b and 5856 of the Revised Judicature Act.<sup>1</sup> Instead, the Legislature and this Court have together established both (1) a clear and unambiguous timeline that a plaintiff must follow before filing a medical malpractice lawsuit and (2) clear and unambiguous consequences for not following the statutory timeline.

It is undisputed that (1) Plaintiff-Appellee did not follow this required timeline, (2) her filing the complaint therefore did not commence a medical malpractice lawsuit, (3) the statute of limitations was not tolled by her filing the complaint and (4) the statute of limitations expired on December 8, 2009. One argument raised by Plaintiff-Appellee is that the statute of limitations affirmative defenses were not sufficient, which Plaintiff-Appellee

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<sup>1</sup> MCL 600.2912b and 600.5856 respectively.

contends completely absolves her from the consequences of not following the timeline mandated by the Michigan Legislature.

- A. The affirmative defense that Gift of Life submitted to raise the statute of limitations defense exceeded the requirements set by this Court in the first *Roberts v Mecosta County General Hospital* decision and therefore did not constitute a waiver of this defense.**

In *Roberts v Mecosta County General Hospital*, 466 Mich 57; 642 NW2d 663 (2002) ("*Roberts I*"), this Court considered whether the defendants had waived or forfeited their right to contend that the plaintiff had not complied with the content requirements of section 2912b. In *Roberts I*, this Court held that:

Absent an express waiver of its right to contest the adequacy of plaintiff's notice of intent or to assert the statute of limitations as a defense, defendant cannot forfeit, or "waive," those rights until the tolling provision becomes an issue. This is because a tolling provision effectively works to negate a statute of limitations defense raised by a defendant. Thus, unless done so expressly, the only ways in which a defendant could effectively "waive" any objections to plaintiff's fulfillment of the requirements of § 5856(d) would be to fail to invoke the pertinent statute of limitations after a plaintiff files suit or to **fail to object to the adequacy of the notice of intent after a plaintiff advances tolling as a response to a statute of limitations defense.**

466 Mich at 67 (emphasis added).

*Roberts I* held that failure to comply with any of the notice requirements of section 2912b prevented the plaintiff from relying upon the tolling provisions of section 5856. 466 Mich at 70-71. The Michigan Legislature subsequently amended the portion of section 5856, which limits the scope of *Roberts I*; however, this amendment does not affect the portion of *Roberts I* applicable to this case.<sup>2</sup> Even after this amendment, a plaintiff's failure

<sup>2</sup> In *Roberts I*, the plaintiff had not complied with the notice of intent content requirements. In *Bush v Shabahang*, 484 Mich 156, 166-170; 722 NW2d 272 (2009), this Court described

to comply with the notice period provisions in section 2912b still prevents the filing of a complaint from commencing a medical malpractice action and tolling the statute of limitations. MCL 600.5856(c); *Driver v Naini*, 490 Mich 239, 257-258; 802 NW2d 311 (2011). Therefore, while section 5856 is now more limited in scope, *Roberts I* still controls whether a defendant in a medical malpractice action has waived the right to raise the statute of limitations as an affirmative defense.

In this case, Gift of Life raised the following affirmative defenses:

4. Plaintiff's claims set forth in this Complaint are barred by the applicable statute of limitations and/or statute of repose.

11. Plaintiff failed to comply with the notice provisions of MCL 600.2912b; MSA 27A.2912b and that Plaintiff's action is thus barred; Defendant gives notice that it will move for summary disposition.<sup>3</sup>

(Exhibit A: Affirmative Defenses 4 and 11). Plaintiff-Appellee denied both affirmative defenses, contending that they were not true. (Exhibit B: Response to Affirmative Defenses 4 and 11). Plaintiff-Appellee did not mention tolling in its response to the affirmative defenses. (*Id.*).

Therefore, Gift of Life raised the statute of limitations as an affirmative defense in its Affirmative Defense 4. Under *Roberts I*, Gift of Life was not required to raise Plaintiff-Appellee's failure to comply with the notice provisions of section 2912b until she argued that the statute of limitations had not run because it had been tolled. Instead of waiting,

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how the amendments changed the effect of content errors in a notice of intent upon the tolling provisions. This case, however, deals with a notice period error.

<sup>3</sup> In subsequent affirmative defenses, Gift of Life challenged the content and adequacy of the Notice of Intent, confirming that Affirmative Defense 11 was objecting to the timing of the filing of the lawsuit after service of the Notice of Intent. (Exhibit A, Affirmative Defense 12 and 13).

however, Gift of Life raised the failure to comply with the notice provisions of section 2912b as Affirmative Defense 11. Therefore, under *Roberts I*, Gift of Life did not waive or forfeit its statutory of limitations affirmative defenses, and these defenses were not defective.

**B. Gift of Life did not waive its statute of limitations defense by filing an affirmative defense based upon the affirmative defense used by the defendants in *Burton v Reed City Hospital* to raise the identical issue.**

Gift of Life did not draft its affirmative defenses in this case from scratch. Instead, it modeled its affirmative defenses upon those used in a prior published decision: *Burton v Reed City Hospital Corp*, 471 Mich 747; 691 NW2d 424 (2005). Like the affirmative defenses pled by Gift of Life, the affirmative defense raised by the defendant in *Burton* provided that:

5. That plaintiff's claim is barred by the applicable statute of limitations.

\* \* \*

12. That plaintiff has failed to comply with the provisions of MCLA 600.2912B and MCLA 600.2912d, *et seq*[], and plaintiff's claim must, therefore be dismissed.

*Burton*, 471 Mich at 748 (all alterations in original). This Court found that "defendants specifically raised the statute of limitations and plaintiff's compliance with MCL 600.2912b in their answer and affirmative defenses." 471 Mich at 755. *Burton* then held that the filing of the complaint did not commence a medical malpractice lawsuit and toll the statute of limitations because the plaintiff had not waited the period of time required by section 2912b before filing the complaint. 471 Mich at 756.

Because Gift of Life was making precisely the *Burton* statute of limitations argument, it used the *Burton* affirmative defenses. It is extremely unusual for a party to have the benefit of an affirmative defense whose use has been approved by this Court.



When a party uses such an approved form, the party is following the guidance from this Court and also intending to provide notice that the same legal issue is being raised as in the prior case. Moreover, a party receiving the *Burton* affirmative defense should be on notice that the identical issues are being raised.

Consequently, by using the *Burton* affirmative defenses, Gift of Life was raising, not waiving, the *Burton* statute of limitations argument. See *Roberts I*, *supra*, 466 Mich at 67. Therefore, this Court should confirm that the *Burton* affirmative defenses used by Gift of Life were not defective, but instead "specifically raise[s] the statute of limitations and plaintiff's compliance with MCL 600.2912b." 471 Mich at 755.

**C. Plaintiff-Appellee knowingly chose to deny the *Burton* affirmative defenses instead of taking any steps to learn more about the bases for these defenses.**

Despite the fact that Gift of Life used the *Burton* affirmative defenses to raise the *Burton* legal argument, Plaintiff-Appellee has contended that it did not understand why Gift of Life was contending that the statute of limitations barred her claim. The primary purpose of pleadings is to notify adverse parties of the claims or defenses being raised in the litigation. See, e.g., *Stanke v State Farm Mutual Automobile Insurance Company*, 200 Mich App 307, 317; 503 NW2d 758 (1993). Therefore, the Michigan Court Rules provide a number of options to a party concerned the adversary's pleadings have not provided sufficient notice of a claim or defense.

The first is a motion for a more definite statement, which is permitted "[i]f a pleading is so vague and ambiguous that it fails to comply with the requirements of these rules." MCR 2.115(A).<sup>4</sup> The proper remedy upon granting such a motion is an order requiring that

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<sup>4</sup> The Court of Appeals has held that while "affirmative defenses should be part of the responsive pleadings, affirmative defenses do not amount to a pleading by themselves."

the adverse party file an amended pleading that cures the deficiency. Therefore, Plaintiff-Appellee could have requested an order compelling Gift of Life to explain why she had not complied with section 2912b and why the statute of limitations barred her claim.

A second option is a motion for summary disposition, which is permitted if an "opposing party has failed to state a claim on which relief can be granted" or an "opposing party has failed to state a valid defense to the claim asserted against him or her." MCR 2.116(C)(8), (9). In this circumstance, the trial "court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). It is well established that leave to amend pleadings should be given freely. MCR 2.118(A)(2). Accord *Ben P. Fyke & Sons v. Gunter Co.*, 390 Mich 649, 656; 213 NW2d 134 (1973). Therefore, had Plaintiff-Appellee filed a motion under MCR 2.116(C)(9), she could have received a more detailed statement of the affirmative defenses.

A third, less formal, option is for counsel confronted with a pleading believed to be deficient is to contact opposing counsel, explain why the pleading does not adequately state a claim or defense and request that the adverse party stipulate to an order requiring the filing of an amended pleading that corrects the deficiency. See, e.g., MCR 2.118(A)(2). Plaintiff-Appellee did not take this route either.

Instead of exercising any of these options, Plaintiff-Appellee expressly denied the *Burton* affirmative defenses. Notably, while Plaintiff-Appellee denied many of the

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*McCracken v. City of Detroit*, 291 Mich App 522, 528; 806 NW2d 337 (2011). Just like pleadings, however, affirmative defenses may be "amended in accordance with MCR 2.118." MCR 2.111(F)(3). Therefore, as the Court of Appeals recognized in this matter, MCR 2.115(A) should apply to affirmative defenses and should authorize a trial court to order that a defendant amend its affirmative defenses if they do not contain the specificity required by MCR 2.111(F)(3) or another rule. 302 Mich App at 215.

affirmative defenses raised by Defendants-Appellants, Plaintiff-Appellee also objected to some because they "did not put Plaintiff on notice of the bases for Defendant's allegations and prayer for relief." (See, e.g., Exhibit B: Plaintiff's Response to Affirmative Defense 10). Therefore, Plaintiff-Appellee made a knowing and intentional decision not to challenge the sufficiency of the *Burton* affirmative defenses or seek additional information regarding the factual basis for these defenses.

In summary, after Gift of Life raised affirmative defenses that complied with the requirements of *Burton* and exceeded the requirements of *Roberts I* for its statute of limitations argument, Plaintiff-Appellee did nothing. If any party has waived the right to raise a legal argument, it was the Plaintiff-Appellee who made a knowing decision not to seek additional information about the *Burton* affirmative defenses. Therefore, this Court should confirm that the *Burton* affirmative defenses used by Gift of Life were sufficient and not defective.

### CONCLUSION AND RELIEF REQUESTED

This Court should reverse the decision by the Court of Appeals and reinstate the order granting summary disposition to Defendant-Appellant Gift of Life.

Respectfully submitted,  
/s C. Thomas Ludden  
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Dated: April 5, 2015

# EXHIBIT A

## STATE OF MICHIGAN

## IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

LISA TYRA

Plaintiff,

Case No. 09-103111-NH

vs.

HON. Nanci J. Grant

ORGAN PROCUREMENT AGENCY OF  
MICHIGAN, a Michigan corporation d/b/a  
GIFT OF LIFE MICHIGAN, STEVEN COHN, M.D.  
DILLIP SAMARA PUNGAVAN, M.D.  
WILLIAM BEAUMONT HOSPITAL, a  
Michigan corporation, and JOHN DOE, believed  
to be Transplant Coordinator

Defendants.

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**ORGAN PROCUREMENT AGENCY OF MICHIGAN d/b/a GIFT OF LIFE MICHIGAN'S  
ANSWER TO COMPLAINT, AFFIRMATIVE DEFENSES, AND RELIANCE ON  
PLAINTIFF'S DEMAND FOR JURY TRIAL**

NOW COMES Defendant, Organ Procurement Agency of Michigan d/b/a Gift of Life Michigan  
("Defendant"), by and through its attorneys, LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.,  
and, in Answer to Plaintiff's Complaint, states:

**FACTUAL ALLEGATIONS TO ALL COUNTS**

1. Answering paragraph 1 of said Complaint, Defendant neither admits nor denies the  
allegations contained therein for lack of knowledge or sufficient information upon which to form a  
reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

2. Answering paragraph 2 of said Complaint, Defendant admits only that it is a Domestic Nonprofit Corporation. Defendant further admits that it has its principal place of business in Ann Arbor, County of Washtenaw, state of Michigan and does business throughout the state of Michigan including the City of Ann Arbor, County of Washtenaw. Further answering, Defendant states that it is an organ recovery organization that acts as the intermediary between donors, physicians and hospital staff, and provides clinical laboratory services for organ and tissue donation and transplantation. Further answering, Defendant neither admits nor denies the remaining allegations for the reason that it lacks sufficient information or knowledge upon which to form a belief and leaves Plaintiff to her strict proofs.

3. Answering paragraph 3 of said Complaint, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

4. Answering paragraph 4 of said Complaint, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

5. Answering paragraph 5 of said Complaint, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

6. Answering paragraph 6 of said Complaint, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

7. Answering paragraph 7 of said Complaint, Defendant admits that an amount in controversy has been alleged granting jurisdiction of the Court, but denies that Plaintiff is entitled to any recovery.

8. Answering paragraph 8 of said Complaint, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

9. Answering paragraph 9 of said Complaint, Defendant admits only that DonorNet, a web-based application for posting donor information, and other electronic organ placement information was operational at the time of Plaintiff's transplant surgery. As to the balance of the allegations, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

10. Answering paragraph 10 of said Complaint, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

11. Answering paragraph 11 of said Complaint, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

12. Answering paragraph 12 of said Complaint, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

13. Answering paragraph 13 of said Complaint, Defendant states that these allegations are legal conclusion prohibited by MCR 2.111(B)(1). Further answering, Defendant neither admits nor

denies the allegations for the reason that it lacks sufficient information or knowledge to form a belief hereto and leaves Plaintiff to her strict proofs.

14. Answering paragraph 14 of said Complaint, including subparagraphs (a) through (e), Defendant neither admits nor denies the allegations for the reason that it lacks sufficient information or knowledge to form a belief hereto and leaves Plaintiff to her strict proofs.

15. Answering paragraph 15 of said Complaint, including subparagraphs (a) through (e), Defendant neither admits nor denies the allegations for the reason that it lacks sufficient information or knowledge to form a belief hereto and leaves Plaintiff to her strict proofs.

16. Answering paragraph 16 of said Complaint, Defendant admits that the Plaintiff's medical records of William Beaumont Hospital reflect some detailed medical information which is more properly viewed in the total context of the circumstances detailed, in part, in the hospital's medical chart. In further response, Defendant denies as untrue any suggestion, assertion or conclusion that any alleged conduct by Defendant has proximately resulted in the injuries set forth in Plaintiff's Complaint.

17. Answering paragraph 17 of said Complaint, Defendant denies as untrue any suggestion, assertion or conclusion that any alleged conduct by Defendant has proximately resulted in the injuries set forth in Plaintiff's Complaint.

18. Answering paragraph 18 of said Complaint, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.



**COUNT I – NEGLIGENCE AS TO ORGAN PROCUREMENT AGENCY OF MICHIGAN**

19. Answering paragraph 19 of said Complaint, Defendant hereby restates, realleges and incorporates by referenced each and every answer set forth above as though fully set forth herein.

20. Answering paragraph 20 of said Complaint, Defendant states that these allegations are legal conclusion prohibited by MCR 2.111(B)(1). Further answering, Defendant admits only to those legal duties imposed by law, under the circumstances of this case, and to no others. As to the balance of the allegations, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

21. Answering paragraph 21 of said Complaint, Defendant neither admits nor denies the allegations for the reason that it lacks sufficient information or knowledge to form a belief hereto and leaves Plaintiff to her strict proofs.

22. Answering paragraph 22 of said Complaint, Defendant denies the allegations contained therein for the reason that said allegations are untrue.

23. Answering paragraph 23 of said Complaint, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

24. Answering paragraph 24 of said Complaint, Defendant denies the allegations contained therein for the reason that said allegations are untrue.

**COUNT II – NEGLIGENCE AS TO DEFENDANT STEVEN COHN, M.D.**

25. Answering paragraph 25 of said Complaint, Defendant hereby restates, realleges and incorporates by referenced each and every answer set forth above as though fully set forth herein.

26. Answering paragraph 26 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

27. Answering paragraph 27 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

28. Answering paragraph 28 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

29. Answering the paragraph identified as 26 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

30. Answering the paragraph identified as 29 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither

admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

**COUNT III – NEGLIGENCE AS TO DEFENDANT DILLIP SAMARA PUNGAVAN**

31. Answering the paragraph identified as 30 of said Complaint, Defendant hereby restates, realleges and incorporates by referenced each and every answer set forth above as though fully set forth herein.

32. Answering the paragraph identified as 31 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

33. Answering the paragraph identified as 32 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

34. Answering the paragraph identified as 33 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

35. Answering the paragraph identified as 34 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent

that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

36. Answering the paragraph identified as 35 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

**COUNT IV – NEGLIGENCE TO DEFENDANT WILLIAM BEAUMONT HOSPITAL**

37. Answering the paragraph identified as 36 of said Complaint, Defendant hereby restates, realleges and incorporates by referenced each and every answer set forth above as though fully set forth herein.

38. Answering the paragraph identified as 37 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

39. Answering the paragraph identified as 38 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

40. Answering the paragraph identified as 39 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

41. Answering the paragraph identified as 40 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

42. Answering the paragraph identified as 41 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

**COUNT V – NEGLIGENCE AS TO DEFENDANT JOHN DOE**

43. Answering the paragraph identified as 42 of said Complaint, Defendant hereby restates, realleges and incorporates by referenced each and every answer set forth above as though fully set forth herein.

44. Answering the paragraph identified as 43 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither

admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

45. Answering the paragraph identified as 44 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

46. Answering the paragraph identified as 45 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

47. Answering the paragraph identified as 46 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

48. Answering the paragraph identified as 47 of said Complaint, Defendant neither admits nor denies the allegations contained therein as they are not applicable to this Defendant. To the extent that these allegations could be construed to apply to this answering Defendant, Defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a reasonable belief thereto and leaves Plaintiff to her strict proofs thereof.

WHEREFORE, Defendant Organ Procurement Agency of Michigan d/b/a Gift of Life Michigan respectfully requests that this Honorable Court dismiss the allegations contained in this Complaint and award Defendant its costs and attorney's fees most unjustly sustained.

**AFFIRMATIVE DEFENSES**

NOW COMES Defendant, Organ Procurement Agency of Michigan d/b/a Gift of Life Michigan ("Defendant"), by and through her attorneys, LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C., and, for its Affirmative Defenses, states:

1. Plaintiff's Complaint, in whole and/or in part fails to state a claim against Defendant upon which relief may be granted.
2. Plaintiff's Complaint and the relief sought therein is barred in whole or in part by the legal and equitable doctrines of waiver, estoppel, unclean hands and laches.
3. Plaintiff is or may be comparatively negligent.
4. Plaintiff's claims set forth in this Complaint are barred by the applicable statute of limitations and/or statute of repose.
5. Any alleged damages sustained by the Plaintiff were proximately caused, totally or in part, by the Plaintiff's own negligence and/or willful acts, and that any recovery by Plaintiff must, therefore, be dismissed in whole or in part.
6. Any injuries sustained by Plaintiff as alleged in the Complaint, if not caused totally or in part by her own negligence, were caused or contributed to, in whole or in part, by the intervening negligence or conduct of persons other than Defendant, its agents, servants, volunteers or employees.
7. Plaintiff was properly advised of the procedure, its risks, benefits and alternatives prior to the procedure, and Plaintiff fully consented thereto and was aware of all pertinent risks.



8. To the extent that Plaintiff is entitled to any non-economic damages, this Court must consider that the award cannot exceed the limitations set forth in MCL §600.1483, MSA 27A.1483.

9. Plaintiff's claims for recovery of expenses paid or payable, in whole or in part, by collateral source are barred by MCL 600.6303(1).

10. Plaintiff is bound by any and all applicable statutes relative to medical malpractice actions enacted by the Michigan Legislature as part of the 1995 Michigan Tort Reform Legislation.

11. Plaintiff failed to comply with the notice provisions of MCL 600.2912b; MSA 27A.2912b and that Plaintiff's action is thus barred; Defendant gives notice that it will move for summary disposition.

12. Plaintiff's claims are barred for failing to provide adequate information in her Notice of Intent as required by MCL 600.2912b.

13. Plaintiff failed to file an Affidavit of Merit which meets the requirements contained in MCL 600.2912d, MSA 27A.2912(4), and that Plaintiff's action is thus barred; Defendant gives notice that it will move for summary disposition.

14. Plaintiff's expert witnesses fail to meet the statutory requirements of MCL 600.2169 and Plaintiff is hereby put on notice that Defendant will move for summary disposition, partial summary disposition and/or to strike experts. Plaintiff is also put on notice that Defendant DOES NOT WAIVE the failure on behalf of Plaintiff to comply with MCL 600.2169.

15. Plaintiff's claims are barred for failing to comply with and make appropriate service under 600.5856.

16. Defendant is immune from tort liability pursuant to MCL 691.1407 and/or MCL 333.10101 to 333.20165.

17. Defendant, at all material times, acted in good faith.



18. Plaintiff is precluded from asserting that Defendant is vicariously liable for the alleged negligence of any of its agents, servants, employees and/or representatives.

19. Plaintiff is bound by all applicable sections of MCL 600.6013, including but not limited to the fact that interest shall not be allowed in future damages from the date of filing of the Complaint to the date of entry of any judgment.

20. Plaintiff's claims against Defendant are frivolous and Defendant is entitled to recover all reasonable costs incurred including Court costs and reasonable attorney fees.

21. Plaintiff failed to make every reasonable effort to mitigate, prevent and/or reduce her alleged damages and injuries.

22. The Affirmative Defenses of the other Defendants or other parties are adopted and incorporated by reference.

23. Defendant reserves the right to add to her Answer and Affirmative Defenses and rely upon all Affirmative Defenses which may be hereafter disclosed by way of discovery.

RELIANCE ON JURY DEMAND

Defendant, Organ Procurement Agency of Michigan d/b/a Gift of Life Michigan, by and through its attorneys, LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C., hereby states limited reliance upon the jury demand previously made herein and, further, hereby demand a jury trial as to all legal claims and defenses at issue in this litigation, WITH THE EXCEPTION OF any and all claims that intrinsically involve issues of law for the trial judge to decide and which, therefore, are properly triable only by the judge assigned to this case.

Respectfully Submitted,

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

By: 

KAREN A. SMYTH (P43009)

MARK E. PHILLIPS (P63063)

Attorneys for Defendant Gift of Life, only

3910 Telegraph Road, Suite 200

Bloomfield Hills, Michigan 48302

(248) 593-5000

Date: September 9, 2009

# EXHIBIT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND


LISA TYRA,

Plaintiff,

VS

ORGAN PROCUREMENT AGENCY OF  
MICHIGAN, a Michigan corporation, d/b/a  
Gift Of Life Michigan, STEVEN COHN, M.D.,  
DILLIP SAMARA PUNGAVAN, M.D.,  
WILLIAM BEAUMONT HOSPITAL, a  
Michigan corporation, and JOHN DOE, believed  
to be Transplant Coordinator,

Defendants.

OAKLAND  
COUNTY 09-103111-NH  
  
JUDGE Nanci J. Grant  
TYRA, LISA v ORGAN PROCURE

CUTLER & CUTLER, PLLC  
By: Donald M. Cutler P12419  
26555 Evergreen, Suite 1508  
Southfield, MI 48076  
Telephone: (248) 424-8844  
Facsimile: (248) 424-8848

RICHARD M. O'CONNOR P23368  
Attorney for Drs. Cohn and Samarapungavan,  
William Beaumont Hospital and John Doe  
4111 Andover Road, Ste 300 East  
Bloomfield Hills, MI 48302  
Telephone: (248) 433-2000

LIPSON, NEILSON, COLE, SELTZER  
& GARAN PC  
By: Karen A. Smyth P43009  
Mark E. Phillips P63063  
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REPLY TO ORGAN PROCUREMENT AGENCY OF MICHIGAN d/b/a  
GIFT OF LIFE MICHIGAN'S ANSWER TO COMPLAINT AND  
AFFIRMATIVE DEFENSES

NOW COMES Plaintiff, Lisa Tyra, by and through her attorneys, Cutler & Cutler,  
PLLC, by Donald M. Cutler, and files her reply to the Answer and answer to the Affirmative  
Defenses of Organ Procurement Agency Of Michigan d/b/a Gift Of Life-Michigan, and

states as follows:

Factual Allegations As To All Counts

1. No reply required.

2. Plaintiff acknowledges Defendant's admissions. Further, no reply is required to the last sentence found within Paragraph 2 response.

3. No reply required.

4. No reply required.

5. No reply required.

6. No reply required.

7. No reply required.

8. No reply required.

9. Answering the allegations of Paragraph 9, Defendant is left to its proofs with regard to the "Donor Net" entity, and states that as to the balance of the allegations of Defendant, Plaintiff does leave said Defendant to its proofs with no reply being made thereto.

10. No reply required.

11. No reply required.

12. No reply required.

13. Answering the allegations of Paragraph 13, Plaintiff denies that the allegations found therein were legal conclusion prohibited by MCR 2.111(B)(1) and further answering, Plaintiff is not required to respond.

14. No reply required.

15. No reply required.

16. Answering the allegations of Paragraph 16, Plaintiff must object to Defendant's circuitous response by way of pleading its answer. Plaintiff advises Defendant that they are now put on notice that Plaintiff will move to strike allegations contained in Paragraph 16 of Defendant's Answer. In further response, Defendant's denial is untrue. The hospital chart entries made by it's representatives, is inappropriate.

17. Answering the allegations of Paragraph 17, Plaintiff denies Defendant's affirmative statements as they are false and untrue.

18. No reply required.

Count I

Negligence As To Organ Procurement Agency Of Michigan

19. Answering the allegations of Paragraph 19, Plaintiff does adopt and repeat her allegations to Paragraphs 1 through and including 18 as though same were fully set forth herein, word for word, sentence by sentence, and paragraph by paragraph.

20. Replying to Defendant's answer in Paragraph 20, Plaintiff states that its allegations were not a legal conclusion prohibited by MCR 2.111(B)(1), for the reason same is untrue. Further replying, Plaintiff admits that the duties imposed by law under the circumstances of this case were violated by Defendant. As to the balance of the allegations contained, Defendant is left to its proofs.

21. No reply required.

22. No reply required.

23. No reply required.

24. No reply required.

Count II  
Negligence As To Defendant Steven Cohn, M.D.

25. Answering the allegations of Paragraph 25, Plaintiff does adopt and repeat her allegations to Paragraphs 1 through and including 24 as though same were fully set forth herein, word for word, sentence by sentence, and paragraph by paragraph.

26. No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

27. No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

28. No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

29(sic 26). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

30(sic 29). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

Count III  
Negligence As To Defendant Dillip Samara Pungavan

31(sic 30). Answering the allegations of Paragraph 31, Plaintiff does adopt and repeat her allegations to Paragraphs 1 through and including 30 as though same were fully set forth herein, word for word, sentence by sentence, and paragraph by paragraph.

32(sic 31). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

33(sic 32). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

34(sic 33). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

35(sic 34). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

36(sic 35). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

Count IV  
Negligence As To Defendant William Beaumont Hospital

37(sic 36). Answering the allegations of Paragraph 37, Plaintiff does adopt and repeat her allegations to Paragraphs 1 through and including 36 as though same were fully set forth herein, word for word, sentence by sentence, and paragraph by paragraph.

38(sic 37). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

39(sic 38). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

40(sic 39). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

41(sic 40). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

42(sic 41). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

Count V  
Negligence As To Defendant John Doe

43(sic 42). Answering the allegations of Paragraph 43, Plaintiff does adopt and



repeat her allegations to Paragraphs 1 through and including 42 as though same were fully set forth herein, word for word, sentence by sentence, and paragraph by paragraph.

44(sic 43). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

45(sic 44). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

46(sic 45). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

47(sic 46). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

48(sic 47). No reply required by Plaintiff, other than noting in fact that the allegations may, in fact, be applicable to this Defendant.

WHEREFORE, Plaintiff prays for the relief set forth in her Complaint as filed in this cause.

#### ANSWER TO AFFIRMATIVE DEFENSES

NOW COMES Plaintiff herein, Lisa Tyra, by and through her attorneys, Cutler & Cutler, PLLC, by Donald M. Cutler, who does file this, her answer to the Affirmative Defenses alleged by Defendant, Organ Procurement Agency Of Michigan, d/b/a Gift Of Life Michigan, and states as follows:

1. Denied for the reason same appears not to be true.
2. Denied for the reason same appears not to be true.
3. Denied for the reason same appears not to be true.
4. Denied for the reason same appears not to be true.

5. Denied for the reason same appears not to be true.

6. Denied for the reason same appears not to be true.

7. Denied for the reason same appears not to be true.

8. Denied for the reason same appears not to be true.

9. Denied for the reason same appears not to be true.

10. Denied for the reason same appears not to be true. Further, objection is made as Defendant's allegations do not place Plaintiff on notice of the bases for Defendant's allegations and prayer for relief.

11. Denied for the reason same appears not to be true.

12. Denied for the reason same appears not to be true.

13. Denied for the reason same appears not to be true.

14. Denied for the reason same appears not to be true.

15. Denied for the reason same appears not to be true.

16. Denied for the reason same appears not to be true.

17. Denied for the reason same appears not to be true.

18. Plaintiff denies the allegation set forth for the reason same appears to be false and untrue.

19. Plaintiff denies the allegation set forth for the reason same appears to be false and untrue.

20. Plaintiff denies the allegation set forth for the reason same appears to be false and untrue.

21. Denied for the reason same appears not to be true.

22. Denied for the reason same appears not to be true.

23. Plaintiff objects that Defendant is attempting to modify both it's Answer and/or it's Affirmative Defenses apparently without notice being filed with this Court and a motion date being set, argued, and taking effect.

CUTLER & CUTLER, PLLC

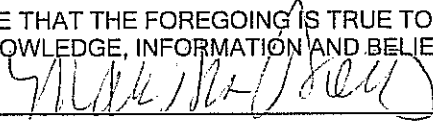
  
By: Donald M. Cutler P12419  
Attorney for Plaintiff  
26555 Evergreen Road, Ste. 1508  
Southfield, MI 48076  
Telephone: (248) 424-8844

DATED: September 18, 2009

PROOF OF SERVICE

The undersigned certifies that on the 24th day of September, 2009, (s)he served a copy of the foregoing instrument upon counsel of record via ☐ facsimile transmission and/or ☒ by placing same in a properly addressed envelope with sufficient 1<sup>st</sup> class postage prepaid thereon, and depositing same in a US mail receptacle located in Southfield, Michigan.

I DECLARE THAT THE FOREGOING IS TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

  
\_\_\_\_\_

C:\Shared\Corel Docs\TYRA, LISA\Pleadings\Reply-AnsToComplaint-OPA 09-18-09.wpd

STATE OF MICHIGAN  
IN THE SUPREME COURT

LISA TYRA

Plaintiff-Appellee,

Supreme Court No. 148079  
Court of Appeals No: 298444  
Lower Court Case No. 09-103111-NH

v.

ORGAN PROCUREMENT AGENCY OF  
MICHIGAN, a Michigan corporation d/b/a  
GIFT OF LIFE MICHIGAN, STEVEN COHN, M.D.,  
DILLIP SAMARA PUNGAVAN, M.D., WILLIAM  
BEAUMONT HOSPITAL, a Michigan corporation,  
and JOHN DOE, believed to be Transplant Coordinator,

Defendants-Appellants.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 6, 2015, I electronically filed a Supplemental Brief Supporting Application for Leave to Appeal by Defendant-Appellant Gift of Life, Exhibits and this Certificate of Service, with the Clerk of the Court using the ECF system which will send notification of such filing to the following: N/A

and I hereby certify that I have mailed by United States Postal Service the above-referenced document(s) to the following non-ECF participants:

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595 Pine Valley Way  
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/s C. Thomas Ludden  
C. Thomas Ludden (P45481)  
Lipson, Neilson, Cole, Seltzer & Garin P.C.  
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